IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Case No, 03-MK-1995 (MJW)

FILED
UNITED STATES DISTRICT COURT

JAN 11 2005

GREGORY C. LANGHAM
CLERK

GEORGE WEBB,

Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, DISMISSING THE PLAINTIFF'S CLAIMS, AND DIRECTING THE CLERK OF COURT TO CLOSE THIS CASE

THIS MATTER comes before the Court on the Defendant's Motion for Summary Judgment **(#13).** Having considered the motion, the response, the reply, and the documentary evidence attached thereto, the Court finds and concludes as follows.

I. Jurisdiction

The Plaintiff Mr. Webb, asserts two claims under the Age Discrimination in Employment Act ("ADEA"). The Court therefore has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

II. Issue Presented

The Court must determine whether a trial is required on either of Mr. Webb's ADEA claims.

III. Material Facts

Based upon the evidence submitted, which the Court construes most favorably to Mr. Webb, the Court finds that:

1. Level 3 Communications, LLC ("Level 3") hired Mr. Webb in December 1997 and relocated him to Colorado in 2000.

2. In 2001, Level 3 experienced a reduction in force. It did not terminate Mr. Webb's employment at that time but instead reassigned him to a new position (Program Manager II) in which Mr. Webb felt more vulnerable to a reduction in force. Employees who were younger than Mr. Webb were not reassigned to other positions.

3. In 2003, Level 3 terminated Mr. Webb's employment during a reduction in force. The duties of Mr. Webb's position were divided among the remaining younger employees.

4. At the time of his termination, Mr. Webb was age 60.

5. Out of eight persons working as a Program Manager II, Mr. Webb was the only one terminated during the 2003 reduction in force. The other seven ranged in age from 30 to 44.

6. Tim Leddy, who was Vice President of

Customer Operations in charge of Account Consultants and Program Managers for Level 3, made the decision to include Mr. Webb in the 2003 reduction in force.

7. In making his decision, Mr. Leddy considered input from Mr. Webb's direct supervisor, Davetta Garcia.

8. Ms. Garcia ranked her employees as part of the 2003 reduction in force, considering how many accounts each employee was involved with, performance and job evaluations, whether the employee was a "player," and additional benefits contributed by each employee to her group.

9. According to Mr. Webb's affidavit, the criteria utilized by Level 3 during the 2003 reduction in force were: (1) performance; (2) skills and qualifications; and (3) tenure.

10. In his 1999 performance evaluation, Mr. Webb received high marks (3's and 4's) and was found by his supervisor to have "exceeded expectations." This was an improvement from his 1998 performance evaluation in which his marks were lower (mostly 2's).

11. Mr. Webb considered himself to be more experienced and qualified than the younger employees retained by Level 3 after the 2003 reduction in force.

12. There is no evidence that Mr. Leddy decided to include Mr. Webb in the 2003 reduction in force because of his age. In his deposition, Mr. Webb stated that there was nothing Mr. Leddy said or did to make him believe that Mr. Leddy had considered Mr. Webb's age.

13. Approximately two months prior to his

termination, Mr. Webb met with Blake Isom, who was the Human Resources Manager. The purpose of the meeting was to assist Mr. Webb in finding a better way to apply his skills at Level 3. During the meeting, Mr. Isom asked Mr. Webb if he believed he had been discriminated against, and Mr. Webb responded that "a case could probably be made for it." Mr. Webb told Mr. Isom that he felt mistreated by a company dominated by younger males and made the observation that most of his younger peers had been promoted when he had not.

14. There is no evidence that Mr. Webb's statement to Mr. Isom was reported to Mr. Leddy.

15. When Mr. Webb relocated to Colorado, Level 3 initially promised to pay his relocation expenses. However, it withdrew that promise before Mr. Webb made the move, claiming there was no money in the budget for that purpose. It did pay relocation expenses for Derek Wilk and Luke Crabtree, both of whom are younger than Mr. Webb and were promoted to director positions upon relocation.

16. Mr. Webb viewed the Level 3 workforce as "young."

17. After his termination, Mr. Webb applied for other positions at Level 3 and was not granted any interviews.

18. After his termination, Mr. Webb applied for retirement benefits in May 2003 but Level 3 did not process his application.[1]

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[1] Although Mr. Webb initially requested retirement benefits in April 2003, Level 3 could not respond directly to his request because both he and Level 3 are represented by counsel in connection with this case. Through his counsel, Mr. Webb renewed the request for retirement

IV. Standard of Review

Determination of claims or defenses on their merits without a trial is governed by Rule 56 of the Federal Rules of Civil Procedure, which facilitates the entry of a judgment if no trial is necessary. *See White v. York Intern. Corp.*, 45 F.3d 357,360 (10th Cir. 1995). Rule 56 authorizes summary adjudication when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed, R. Civ. P. 56(c). Substantive law determines the material facts and issues. It specifies the elements that must be proved for a given claim or defense, sets the standard of proof and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producers Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See* Fed. R. Civ. P. 56(e). Once the moving party has met its burden, to avoid summary judgment the responding party must present sufficient, competent, contradictory evidence to

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benefits in May 2003.

establish a genuine factual dispute. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cit. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999).

If the moving party does not have the burden of proof at trial, it must point to an absence of evidence in the record to support the claim or defense which the other party is obligated to prove. If the respondent fails to produce sufficient competent evidence to establish its claim or defense, the claim or defense must be dismissed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

V. Analysis

A. Age Discrimination

Mr. Webb claims that Level 3 terminated his employment because of his age. To establish a *prima facie* case of discrimination on the basis of age, Mr. Webb must produce evidence that:

(1) He was within the protected age group;

(2) He was doing satisfactory work;

(3) He was discharged; and

(4) He was treated less favorably than younger employees during the reduction in force.

See Rivera v. City and County of Denver, 365 F.3d 912,920 (10th Cir. 2004); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988). If Mr. Webb presents evidence of a *prima facie* case, the burden shifts to Level 3 to articulate a legitimate, non-discriminatory reason for the adverse employment action. *See Rivera*, 365 F.3d at 920; *see also*

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Level 3 sets forth such a reason, then the burden shifts back to Mr. Webb to produce evidence that Level 3's reason is pretextual. *See Jones v. Unisys Corp.*, 54 F.3d 624 630 (10th Cir. 1995). To demonstrate pretext, Mr. Webb's evidence must show either that Level 3's decision was more likely motivated by discrimination or that Level 3's reason is unworthy of credence. *See id.* at 632.

Level 3 challenges Mr. Webb's ability to establish that Level 3 intended to discriminate against Mr. Webb in deciding to terminate his employment. Level 3 characterizes this as the fourth element of a *prima facie* claim, but in the context of this case, it actually pertains to pretext. Level 3 does not challenge Mr. Webb's ability to establish that he is in a protected age group, that he was doing satisfactory work, that he was discharged, or that younger employees were retained during the 2003 reduction in force.

Assuming that Mr. Webb can establish a *prima facie* claim of discrimination, Level 3 has produced evidence in support of a nondiscriminatory reason for Mr. Webb's termination — a reduction in force. Mr. Webb must therefore show that this reason is pretextual.

In a reduction in force case, an employee can generally establish pretext in one of three ways. *See Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998). First, he can show that his termination does not comport with the criteria employed during the reduction in force. Second, he can produce evidence that his evaluation under the reduction in force criteria was falsified or manipulated, or that the supervisor who made the decision to include him in the reduction in force displayed ageist animus. Third, he can produce evidence that the reduction in force was generally pretextual, *i.e.*, that its goal was to

eliminate older employees and replace them with new hires. However, these three methods of establishing pretext do not foreclose others. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000).

Mr. Webb argues that the criteria used during the reduction in force were subjective and that he is entitled to an inference of discrimination. The use of subjective factors may result in an inference of discrimination for purposes of establishing a *prima facie* case, but it does not constitute discrimination *per se*. *See Pitre v. Western Electric Co., Inc.*, 843 F.2d 1262, 1271-72 (10th Cir. 1988). Thus, Mr. Webb must do more to establish pretext.

Mr. Webb offers evidence that the Level 3 workforce was young. However, Mr. Webb's age in relation to the age of others retained by Level 3 is not, by itself, evidence of pretext. Under the ADEA, age is a neutral factor — employers cannot accord preferential treatment to employees because of their age. *See Branson*, 853 F.2d at 772. Thus, Mr. Webb must show that the likely reason for his inclusion in the reduction in force was his age.

Mr. Webb identifies three criteria used by Level 3 during the 2003 reduction in force: (1) performance; (2) skills and qualifications; and (3) tenure. He offers evidence that his performance level as of 1999 was high and that he believed himself to be more qualified than the younger employees retained by Level 3. However, he offers no evidence concerning the performance of the employees who were retained during the reduction in force or their skills and qualifications. Moreover, Mr. Webb's opinion that he was more qualified than the younger employees retained by Level 3 is not evidence of pretext because it is the employer's perception of the employee's qualifications — not the employee's — which matters. *See id.*

Mr. Webb also offers evidence of several instances in which he perceives that younger employees were treated more favorably than he was prior to his termination. He points to his non-receipt of a relocation package in 2000, his 2001 job reassignment, and the promotion of younger employees. However, he offers no evidence to connect these prior instances of alleged discrimination with Mr. Leddy's decision to include him in the reduction in force. While such alleged discrimination might have led to independent claims not asserted in this action, they do not show discrimination by Mr. Leddy, the decisionmaker with regard to the 2003 reduction in force.

Mr. Webb also offers evidence of alleged discrimination after his termination. He contends that after his termination, he applied for positions with Level 3 but was not granted any interviews. He also contends that Level 3 has not processed his May 2003 application for retirement benefits. Again, he offers no evidence to connect these subsequent instances of alleged discrimination with Mr. Leddy's prior decision to include him in the reduction in force. He also offers no evidence regarding the individuals who were selected for interviews or offered the positions. Assuming that these alleged instances of post-termination discrimination could give rise to independent claims, they do not show discrimination by Mr. Leddy.

In the context of a reduction in force, a terminated employee may show pretext by presenting evidence that his job was not eliminated and that his position — as a single, distinct position — was assumed by a younger employee. *See Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1169 (10th Cir. 2003). Mr. Webb has presented evidence that his job duties were divided among younger employees. Thus, he contends that his job was not eliminated. His evidence, however, does not show that a single, distinct position

remained after his termination.

Mr. Webb has offered no evidence that Mr. Leddy's decision to include him in the reduction in force was likely motivated by discrimination. Rather, his evidence is to the contrary. In his deposition, Mr. Webb conceded that there was nothing Mr. Leddy did or said to make Mr. Webb believe that Mr. Leddy had considered Mr. Webb's age. Thus, no reasonable jury could conclude that Mr. Webb's employment was terminated for any reason apart from a reduction in force.

B. Retaliation

Mr. Webb claims that Level 3 terminated his employment because he complained about age discrimination to Mr. Isom To establish a *prima facie* case of retaliation, Mr. Webb must produce evidence that:

(1) He engaged in a protected activity;
(2) Level 3 took an adverse employment action against him; and
(3) There is a causal connection between the protected activity and the adverse employment action.

See Stover v. Martinez, 382 F.3d 1064, 1071(10th Cir. 2004). If Mr. Webb presents evidence of a *prima facie* case, the *McDonnell Douglas* burden-shifting analysis applies. *See id.*

Level 3 challenges Mr. Webb's ability to establish the first and third elements of a *prima facie* case — that he engaged in protected opposition to discrimination and that there is a causal connection between a protected activity and Mr. Webb's termination. Even assuming that Mr. Webb's conversation with Mr. Isom qualifies as protected opposition

to discrimination, Mr. Webb has offered no evidence as to a causal connection — that Mr. Leddy knew about the conversation and decided to include Mr. Webb in the reduction in force because of it. Thus, Mr. Webb has not produced sufficient evidence in support of a *prima facie* claim of retaliation.

Even if Mr. Webb had produced sufficient evidence in support of a *prima facie* claim, Level 3 has produced evidence in support of a nondiscriminatory reason for Mr. Webb's termination — that Level 3 terminated his employment as part of a reduction in force. As discussed *supra,* Mr. Webb has not offered sufficient evidence from which a reasonable jury could conclude that Level 3's reason is pretextual.

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment **(#13)** is **GRANTED**. The Plaintiffs claims are **DISMISSED,** with prejudice, and the Clerk of Court is directed to close this case.

Dated this 11th of January, 2005.

BY THE COURT:

s/Marcia S. Krieger
Marcia S. Krieger
United States District Judge

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Honorable Marcia S. Krieger

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JUDGMENT

On January 11, 2005, the Court dismissed the Plaintiff's claims against the Defendant and directed the Clerk of Court to close this case, Based thereon,

IT IS ORDERED that judgment is entered in favor of the Defendant and against the Plaintiff.

IT IS FURTHER ORDERED that the Defendant shall have its costs upon the filing of a Bill of Costs with the

Clerk of Court within 10 days of entry of this judgment.
Dated this 13th day of January, 2005.

BY THE COURT:
Marcia S. Krieger
United States District Judge